

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REJECTS SKATE MAGAZINE, INC., a
Tennessee corporation; WESLEY M.
DRIVER; RADIUS MEDIA, LLC, an Alabama
limited liability company; and SHAWN
ENGLER,

Plaintiffs,

v.

ACUTRACK, INC.,

Defendant.

No. C 06-2590 CW

ORDER GRANTING IN
PART AND DENYING
IN PART
DEFENDANT'S
MOTION TO DISMISS

Defendant Acutrack, Inc., moves pursuant to Federal Rules of Civil Procedure 9(b), 12(b)(1) and 12(b)(6) to dismiss the complaint filed against it by Plaintiffs Rejects Skate Magazine, Inc. (Rejects), Wesley Driver, Radius Media, LLC and Shawn Engler, and, in the alternative, to strike Plaintiffs' claim for punitive damages. Plaintiffs oppose the motion. The matter was taken under submission on the papers. Having considered all of the papers filed by the parties, the Court grants the motion to dismiss the claim for negligent and intentional infliction of emotional distress, but otherwise denies Defendant's motion to dismiss.

BACKGROUND

Unless otherwise noted, the following facts are taken from the

1 Complaint and are assumed to be true for purposes of this motion.

2 Mr. Driver organized and operated Rejects out of his home in
3 Tennessee and founded its eponymous magazine. The magazine
4 targeted minors who were interested in skating and, up until
5 February, 2003, it enjoyed substantial growth, including being
6 placed for sale in Barnes & Noble Bookstores, and had a bright
7 future. As part of its marketing plan, many issues of the magazine
8 included DVDs, with similar skate content.

9 Radius is a company founded by Mr. Engler, organized and
10 operating in Alabama. Radius produced Rejects' DVDs, and the two
11 companies worked closely with each other to ensure that the content
12 of the DVDs was similar to that of the magazine. Mr. Engler acted
13 as an agent for Mr. Driver, Radius and Rejects.

14 Plaintiffs entered into an agreement with Defendant (described
15 as a "foreign" corporation doing business in Tennessee) to
16 reproduce Rejects' DVD No. 4. In making the agreement, Plaintiffs
17 relied on the following false statements of material fact made by
18 Defendant:

- 19 A. That defendant Acutrack had performed numerous duplication
20 and/or replication jobs in the past without making
21 mistakes;
- 22 B. That defendant Acutrack would reproduce Rejects DVD #4 in
23 substantially the same form in which it was received;
- 24 C. That the defendant Acutrack used advanced processes to
25 insure that Rejects DVD No. 4 would be replicated and/or
26 duplicated in substantially the same form in which it was
27 received;
- 28 D. That defendant Acutrack took proper measures to ensure
that its reproduction process yielded replicates and/or
duplicates that were substantially similar to the
original;
- E. That DVDs reproduced and/or replicated by the defendant
Acutrack exceeded industry standards.

27 Complaint ¶ 44. The Complaint does not specify which portions of

1 these statements were false, or if they were all false in their
2 entirety.

3 Defendant failed to perform its obligations under the
4 agreement by failing to reproduce the DVD supplied by Plaintiffs.
5 Instead, "on a substantial number of DVDs, Acutrack produced and/or
6 reproduced gay pornography, including a hardcore gay pornographic
7 movie named "Hard Hat Pigs." Complaint ¶ 15. The pornographic
8 DVDs were then distributed with Rejects' magazine to retail outlets
9 for sale, and viewed by children across the country.

10 As a result, Plaintiffs suffered damage, including the demise
11 of Rejects' magazine and serious economic harm to Radius. Mr.
12 Engler and Mr. Driver suffered severe damage to their reputations,
13 severe mental anguish and emotional distress, substantial debt and
14 loss of substantial income.

15 Plaintiffs bring claims for (1) breach of contract;
16 (2) negligence, gross negligence and/or wantonness based on
17 Defendant's alleged "duty to reproduce the content on Rejects DVD
18 No. 4 in a professional manner" and to reproduce substantially
19 identical content to that sent to it by Plaintiffs; (3) negligent
20 and/or intentional misrepresentation; and (4) intentional and/or
21 negligent infliction of emotional distress. Plaintiffs seek
22 compensatory and punitive damages.

23 Plaintiffs originally filed a complaint in Alabama State court
24 on April 7, 2004. Defendant moved to dismiss on various grounds.
25 The Alabama court granted Defendant's motion to dismiss under the
26 doctrine of forum non conveniens. Plaintiffs then filed the
27 current Complaint in Tennessee State court on April 18, 2005.

1 Defendant removed the case to the United States District Court for
2 the Middle District of Tennessee. According to Defendant's Notice
3 of Removal, the district court had jurisdiction "because complete
4 diversity exists and the amount in controversy exceeds \$75,000.00."
5 Pls.' Ex. A, Def.'s Not. of Removal ¶ 3. Defendant's allegations
6 regarding the citizenship of the parties were the same as those in
7 the Complaint, except that Defendant specified that it is a
8 California corporation with its principal place of business in
9 Livermore, California, and that Mr. Engler is and was a resident of
10 Alabama. Id. ¶¶ 6, 8. Defendant also noted that Mr. Driver is now
11 a resident of New York. Id. ¶ 5. Plaintiffs moved to remand on
12 that grounds that Defendant had waived its right to removal by
13 consenting to the dismissal of the Alabama action and to the
14 jurisdiction of the State of Tennessee. The Tennessee district
15 court denied the motion. Pls.' Ex. B, August 22, 2005 Order at 2.
16 That court later granted Defendant's motion for transfer of venue
17 to the Northern District of California.

LEGAL STANDARDS

I. Rule 12(b)(1)

20 Dismissal is appropriate under Rule 12(b)(1) when the district
21 court lacks subject matter jurisdiction over the claim. Fed. R.
22 Civ. P. 12(b)(1). Federal subject matter jurisdiction must exist
23 at the time the action is commenced. Morongo Band of Mission
24 Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380 (9th
25 Cir. 1988), cert. denied, 488 U.S. 1006 (1989). A Rule 12(b)(1)
26 motion may either attack the sufficiency of the pleadings to
27 establish federal jurisdiction, or allege an actual lack of

jurisdiction which exists despite the formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

Subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the case.¹ Therefore, a Rule 12(b)(1) challenge should be decided before other grounds for dismissal, because they will become moot if dismissal is granted. Alvares v. Erickson, 514 F.2d 156, 160 (9th Cir.), cert. denied, 423 U.S. 874 (1975).

A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). An action should not be dismissed for lack of subject matter jurisdiction without giving the plaintiff an opportunity to amend unless it is clear that the jurisdictional deficiency cannot be cured by amendment. May Dep't Store v. Graphic Process Co., 637 F.2d 1211, 1216 (9th Cir. 1980). Absent an independent basis, the agreement of the parties does not confer subject matter jurisdiction. Brockman v. Merabank, 40 F.3d 1013, 1017 (9th Cir. 1994).

II. Rule 12(b)(6)

A motion to dismiss for failure to state a claim will be denied unless it is "clear that no relief could be granted under

¹Therefore, the parties' focus on whether Defendant "waived" its challenge to the Court's subject matter jurisdiction by removing this case to Tennessee district court is inapposite.

1 any set of facts that could be proved consistent with the
2 allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132 (9th
3 Cir. 2002), citing Swierkiewicz v. Sorema N.A., 534 U.S. 506
4 (2002). All material allegations in the complaint will be taken as
5 true and construed in the light most favorable to the plaintiff.
6 NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

7 When granting a motion to dismiss, a court is generally required to
8 grant a plaintiff leave to amend, even if no request to amend the
9 pleading was made, unless amendment would be futile. Cook, Perkiss
10 & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-
11 47 (9th Cir. 1990). In determining whether amendment would be
12 futile, a court examines whether the complaint could be amended to
13 cure the defect requiring dismissal "without contradicting any of
14 the allegations of [the] original complaint." Reddy v. Litton
15 Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend
16 should be liberally granted, but an amended complaint cannot allege
17 facts inconsistent with the challenged pleading. Id. at 296-97.

18 III. Rule 9(b)

19 "In all averments of fraud or mistake, the circumstances
20 constituting fraud or mistake shall be stated with particularity."
21 Fed. R. Civ. P. 9(b). The allegations must be "specific enough to
22 give defendants notice of the particular misconduct which is
23 alleged to constitute the fraud charged so that they can defend
24 against the charge and not just deny that they have done anything
25 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).
26 Statements of the time, place and nature of the alleged fraudulent
27 activities are sufficient, Wool v. Tandem Computers, Inc., 818 F.2d
28

1 1433, 1439 (9th Cir. 1987), provided the plaintiff sets forth "what
2 is false or misleading about a statement, and why it is false."²
3 In re GlenFed, Inc., Sec. Litig., 42 F.3d 1541, 1548 (9th Cir.
4 1994). Scierter may be averred generally, simply by saying that it
5 existed. See id. at 1547; see Fed. R. Civ. P. 9(b) ("Malice,
6 intent, knowledge, and other condition of mind of a person may be
7 averred generally"). As to matters peculiarly within the opposing
8 party's knowledge, pleadings based on information and belief may
9 satisfy Rule 9(b) if they also state the facts on which the belief
10 is founded. Wool, 818 F.2d at 1439.

11 DISCUSSION

12 I. Subject Matter Jurisdiction

13 Defendant moves to dismiss the Complaint for lack of subject
14 matter jurisdiction, on the grounds that Plaintiffs' original
15 pleading in Tennessee State court failed to specify the citizenship
16 of each Plaintiff and failed to state that the amount in
17 controversy was more than \$75,000.

18 District courts have original jurisdiction over all civil
19 actions "where the matter in controversy exceeds the sum or value
20 of \$75,000, exclusive of interest and costs, and is between . . .
21 citizens of different States." 28 U.S.C. § 1332(a).

22 Here, most of the necessary elements of diversity jurisdiction
23 which Defendant now claims are missing have in fact been

24
25 ²Defendant mistakenly relies on Desaigoudar v. Meyercord, 223
26 F.3d 1020, 1022 (9th Cir. 2000) for the proposition that averments
27 of fraud must be plead with a "high degree of meticulousness"; this
28 standard refers to the requirements of the Private Securities
Litigation Reform Act.

1 affirmatively established by Defendant's own pleading in its Notice
2 of Removal, which is attached to Plaintiffs' opposition and is also
3 part of the docket transferred to this Court from Tennessee. For
4 instance, the Notice of Removal indicates that the amount in
5 controversy is more than \$75,000 and that Defendant is a citizen
6 and resident of California. Moreover, Defendant affirmatively
7 represented that "complete diversity exists." Notice of Removal

8 ¶ 3. The Tennessee district court presumably relied on this
9 statement in exercising jurisdiction and denying Plaintiffs' motion
10 to remand, although it appears from the judge's order that
11 Plaintiffs argued only that Defendant had waived its right of
12 removal, not Defendant lacked the right to remove. Defendant does
13 not now claim that the statements it alleged in the Notice of
14 Removal are mistaken or present any other reason why the Court
15 should not rely on the representations therein. However, in light
16 of Defendant's current position, if Plaintiffs would like the Court
17 to remand this case to Tennessee State court, the Court will do so
18 on their request. The Court denies Defendant's motion to dismiss
19 for lack of subject matter jurisdiction.

20 II. Economic Loss Doctrine

21 Defendant moves to dismiss Plaintiffs' claims for negligence,
22 misrepresentation and emotional distress on the grounds that they
23 are precluded by the economic loss doctrine.

24 Under California's economic loss rule, to recover in tort for
25 damages caused by a defective product, a plaintiff must demonstrate
26 personal injury or damage to property other than the product
27 itself. Jimenez v. Super. Ct., 29 Cal. 4th 473, 483 (2002); Aas v.

1 Super. Ct., 24 Cal. 4th 627, 635-36 (2000). Generally, a tortious
2 breach of contract may be found when

3 (1) the breach is accompanied by a traditional common law
4 tort, such as fraud or conversion; (2) the means used to
5 breach the contract are tortious, involving deceit or undue
6 coercion; or (3) one party intentionally breaches the contract
intending or knowing that such a breach will cause severe,
unmitigable harm in the form of mental anguish, personal
hardship, or substantial consequential damages.

7 Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 990 (2004)
8 (quoting Ehrlich v. Menezes, 21 Cal. 4th 543, 553-54 (1999)).

9 Claims of fraud and intentional misrepresentation that are
10 independent of a breach of contract are not subject to the economic
11 loss rule. Id. at 991.

12 Plaintiffs argue that the economic loss rule is inapposite
13 because the contract here was for services, not a product.
14 However, as this Court has held in another case involving the
15 economic loss doctrine,³ the limitation on tort recovery applies to
16 the negligent performance of services as well as to the negligent
17 manufacture of goods. As the Court has reasoned,

18 The Aas Court briefly addressed the plaintiffs' contention
19 that the economic loss rule does not apply to the negligent
20 performance of service. In a footnote, the Aas Court noted,
21 "Plaintiffs also argue that Seely [v. White Motor Co.], 63 Cal.
22 2d 9, 18 (1965) does not apply to the negligent performance
23 of services, as distinguished from the negligent manufacture
24 of products." [Aas, 24 Cal. 4th at] 645, n. 11 (internal
citation omitted) (emphasis in original). The Aas Court
responded that "the basis for that argument appears, once
again, to be that J'Aire takes precedence over Seely." Id.
(internal citation omitted). Read in the context of the
opinion as a whole, this passage suggests that the Aas Court

25 ³Kalitta Air, LLC v. Cent. Tex. Airborne Systems, Inc., No. C
26 96-2494 CW (N.D. Cal. judgment as a matter of law granted in part,
27 July 22, 2005), petitions for permission to appeal granted, Nos.
05-16841 and 05-16842 (9th Cir. Sept. 20, 2005).

1 rejected the plaintiffs' contention that negligent performance
2 of services is to be treated differently than the negligent
3 manufacture of goods. This interpretation of this passage is
4 supported by other passages of the Aas opinion that draw no
5 distinction between these situations. See id. at 636 ("For
6 defective products and negligent services that have caused
7 neither property damage nor personal injury, however, tort
8 remedies have been uncertain."). In addition, the Aas Court
9 specifically rejected the plaintiffs' argument, based on North
10 American Chemical Co. v. Superior Court, 59 Cal. App. 4th 764,
11 774 (1997), that those plaintiffs in contractual privity with
12 the defendant are entitled to recover for negligent
13 performance of a service contract. Id. at 642-43. The Aas
14 Court explained that a "person may not ordinarily recover in
15 tort for the breach of duties that merely restate contractual
16 obligations." Id. at 643. For these reasons, the Court
17 concludes that economic loss rule applies to the negligent
18 performance of services as well as to the negligent
19 manufacture of goods.

20 Order Granting Pl.'s Req. for Clarification and Denying Def.'s
21 Req., Kalitta, slip op. at 8-9 (Aug. 19, 2004) (full citation for
22 Seely added). Therefore, the Court will apply the economic loss
23 rule here regardless of whether the parties' contract is defined as
24 one for a product (i.e., duplicated DVDs) or services (duplication
25 of DVDs).

26 Plaintiffs' negligence claim merely restates its breach of
27 contract claim, thereby subjecting Plaintiffs' claim to application
28 of the economic loss doctrine. However, because Plaintiffs could
arguably prove, consistent with the allegations in the Complaint,
personal injury or damage to other property, the Court denies
Defendant's motion to dismiss the negligence claim.

Plaintiffs' claims for negligent or intentional
misrepresentation and negligent or intentional infliction of
emotional distress are traditional common law tort claims. By
alleging these torts, Plaintiffs have alleged violations of duties
independent of the contract; therefore, the economic loss doctrine

1 does not apply to those claims.

2 Therefore, the Court denies Defendant's motion to dismiss, on
3 the basis of the economic loss rule, Plaintiffs' claims for
4 negligence, negligent or intentional misrepresentation and
5 negligent or intentional infliction of emotional distress.

6 III. Failure to Plead with Particularity

7 Defendant moves to dismiss Plaintiffs' claim for negligent or
8 intentional misrepresentation on the ground that Plaintiffs have
9 failed to plead this claim with the particularity required by Rule
10 9(b).

11 Plaintiffs specify in their Complaint the particular
12 statements, made over the telephone by Defendant in late December,
13 2002, which are alleged to be false. However, a plaintiff

14 must set forth more than the neutral facts necessary to
15 identify the transaction. The plaintiff must set forth what
is false or misleading about a statement, and why it is false.

16 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)

17 (quoting Decker v. GlenFed, Inc., 42 F.3d 1541, 1548 (9th Cir.

18 1994)).⁴ Here, the Complaint makes clear that the DVDs were not

19 correctly duplicated, a fact which presumably forms the basis of

20 Plaintiffs' belief that certain of Defendant's alleged statements

21 (e.g., that Defendant "took proper measures to ensure that its

22 reproduction process yielded replicates that were substantially

23 similar to the original") were false or misleading. See Complaint

24
25 ⁴Defendant also relies upon Decker for the proposition that
26 Plaintiffs must plead with particularity "an explanation as to why
the disputed statement[s were] untrue or misleading when made." 42
27 F.3d at 1549. However, this portion of Decker refers to the
heightened pleading standard applicable in securities fraud cases.

¶ 44(D) and (E). Although Plaintiffs have not explained why statements such as that in ¶ 44(A), alleging that Defendant said it would use advance processes to duplicate the DVDs, were false or misleading, the Complaint is sufficient without them.

Therefore, the Court denies Defendant's motion to dismiss Plaintiffs' claim for negligent or intentional misrepresentation.

IV. Emotional Distress

Defendant moves to dismiss Plaintiffs' claim for negligent or intentional infliction of emotional distress on the grounds that Plaintiffs have failed to allege any outrageous conduct, severe emotional distress or causation. Plaintiffs do not oppose this portion of Defendant's motion. A claim for infliction of emotional distress damages requires "extreme and outrageous" conduct by a defendant that is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1001 (1993) (quoting Christensen v. Sup. Court, 54 Cal. 3d 868, 903 (1991)). The Court agrees that none of Defendant's alleged acts or omissions can be described as extreme and outrageous, despite Plaintiffs' conclusory descriptions. Accordingly, the Court grants Defendant's motion to dismiss Plaintiffs' claim for negligent or intentional infliction of emotional distress. Plaintiffs do not request leave to amend; however, the Court will allow them to file a FAC including a claim for intentional or negligent infliction of emotional distress if they can, truthfully and consistently with the original complaint, allege facts showing that Defendant engaged in extreme and outrageous conduct.

1 V. Punitive Damages

2 Finally, Defendant moves to strike Plaintiffs' demand for
3 punitive damages on the grounds that they have failed to state a
4 claim that would support punitive damages.

5 [P]unitive or exemplary damages, which are designed to punish
6 and deter statutorily defined types of wrongful conduct, are
7 available only in actions for breach of an obligation not
8 arising from contract. In the absence of an independent tort,
punitive damages may not be awarded for breach of contract
even where the defendant's conduct in breaching the contract
was wilful, fraudulent, or malicious.

9 Cates Constr., Inc. v. Talbot Partners, 21 Cal. 4th 28, 61 (quoting
10 Cal. Civ. Code § 3294(a) and Applied Equipment Corp. v. Litton
11 Saudi Arabia Ltd., 7 Cal. 4th 503, 516 (1994)) (internal quotation
12 marks, internal citations and emphasis omitted).

13 In Section II above, the Court denied Defendant's motion to
14 dismiss Plaintiffs' claim for negligence, on the grounds that they
15 could, consistently with the Complaint, prove a type of damage that
16 would avoid application of the economic loss rule. In addition,
17 Plaintiffs' fraud claim survives. These claims would support
18 punitive damages. Therefore, Defendant's motion to strike is
19 denied.

20 CONCLUSION

21 For the foregoing reasons, the Court GRANTS Defendant's motion
22 to dismiss Plaintiffs' claim for negligent or intentional emotional
23 distress but otherwise DENIES the motion (Docket No. 11).
24 Plaintiffs may file a FAC within twenty days of the date of this
25 order, if they can, truthfully and without contradicting the
26
27
28

1 original complaint, allege facts showing that Defendant engaged in
2 extreme and outrageous conduct.

3
4 IT IS SO ORDERED.

5
6 Dated: 8/22/06



CLAUDIA WILKEN
United States District Judge